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No. 91-587

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.; NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS; NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, INC.; NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS; NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS; PROFESSIONAL INSURANCE AGENTS OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; INDEPENDENT INSURANCE AGENTS OF DELAWARE; THE DELAWARE ASSOCIATION OF LIFE UNDERWRITERS; and AMERICAN COUNCIL OF LIFE INSURANCE,

Petitioners,

v.

CITICORP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT CITICORP IN OPPOSITION

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QUESTION PRESENTED

Whether Section 4 of the Bank Holding Company Act, which does *not* authorize the Board of Governors of the Federal Reserve System to regulate the activities of state banks that are subsidiaries of bank holding companies, nevertheless does authorize the Board to regulate these same activities when conducted by *subsidiaries* of state banks that are subsidiaries of bank holding companies.

RULE 29.1 STATEMENT

Citicorp has no parent corporation. The only subsidiaries of Citicorp whose stock may be publicly held are: Ambac, Inc., Delaware; Banco Honduras, S.A.; Central Holdings Corp.; Citibank Espana, S.A.; Citibank Portugal, S.A.; City Trust Banking Corp.; Companie Generale de Banque Citibank; Citibank Belgium, S.A.; Citibank Privatkunden A.G. (formerly KKB Bank, A.G.); Saudi American Bank; Taiwan First Investment & Trust Co., Ltd.; and the United Bank of Trinidad and Tobago Limited.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
1. Regulation of Banks	3
2. Insurance Activities of Banks	4
3. Board Authority To Regulate Bank Holding Companies But Not Banks	4
4. Delaware Law Authorizing Insurance Activities	6
5. Proceedings Below	6
ARGUMENT	8
I. THE DECISION BELOW WAS CORRECT	8
A. The Purpose, Structure and Text of the BHCA	9
B. The Terms of Sections 4(a)(1) and 2(g)(1)	12
C. *Chevron*	14
II. THIS CASE DOES NOT INVOLVE ANY CIRCUIT CONFLICT OR PRESENT ANY LEGAL QUESTION OF GENERAL IMPORTANCE, NOR IS THE DECISION OF ANY SUBSTANTIAL PRACTICAL SIGNIFICANCE	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

	Page
Bethesda Hospital Association v. Bowen, 485 U.S. 399 (1988)	15
Cabell v. Markham, 148 F.2d 737 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)	12
Cameron Financial Corp. v. Board of Governors, 497 F.2d 841 (4th Cir. 1974)	9
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	14, 15
Independent Bankers Association v. Board of Governors, 516 F.2d 1206 (D.C. Cir. 1975)	11
Independent Insurance Agents of America, Inc. v. Board of Governors, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 44 (1990)	*passim*
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)	12
Kelly v. Robinson, 479 U.S. 36 (1986)	12
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990)	15
Sullivan v. *Zebley*, 493 U.S. 521 (1990)	15
Thompson v. Thompson, 484 U.S. 174 (1988)	12

STATUTES

Act of July 1, 1966, Pub. L. No. 89-485, § 12(a), 80 Stat. 236 (1966)	14
Bank Holding Company Act, 12 U.S.C. 1841 *et seq.*	*passim*
Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*	3
Federal Reserve Act, 12 U.S.C. 221 *et seq.*	3
National Bank Act, 12 U.S.C. 21 *et seq.*	3
12 U.S.C. 371c	14
Conn. Gen. Stat. § 36-142 (1990)	4
Del. Code Ann. tit. 5, §§ 761, 767 (Supp. 1990)	6
Mass. Gen. L. ch. 178 §§ 2, 6, 8 (1990)	4
N.Y. Banking Law art. VI-A §§ 261, 263, 264 (McKinney 1990)	4

REGULATIONS AND LEGISLATIVE MATERIALS

12 C.F.R. 5.34	3
12 C.F.R. 225.22	*passim*

TABLE OF AUTHORITIES—Continued

	Page
12 C.F.R. 250.141	3, 13
12 C.F.R. 250.240	13, 14
53 Fed. Reg. 48,915 (1988)	11
56 Fed. Reg. 54,347 (1991)	11
Amend the Bank Holding Company Act of 1956: Hearings on S. 2353, S. 2418, and H.R. 7371 Before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. 341-42 (1966)	13
Comprehensive Deposit Insurance Reform and Taxpayer Reform Act of 1991, H.R. Conf. Rep. No. 407, 102d Cong., 1st Sess. 1-167 (Nov. 27, 1991), *reprinted in* 137 Cong. Rec. H11,761-11,805 (daily ed. Nov. 26, 1991)	2, 4, 17
H.R. Rep. No. 387, 91st Cong., 1st Sess. 15 (1969)	9
H.R. Rep. No. 609, 84th Cong., 1st Sess. 16 (1955)	9
S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955)	9
MISCELLANEOUS	
American Banker, Dec. 2, 1991	17
Conference of State Bank Supervisors, *State of the State Banking System* (1989)	4
P. Heller, Federal Bank Holding Company Law (1991)	11
Report Under Bank Holding Company Act, 44 Fed. Res. Bull. 776 (1958)	13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 936 F.2d 66. The order of the Board of Governors of the Federal Reserve System (Pet. App. 22a-43a) is reported at 76 Fed. Res. Bull. 977 (1990).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1991. Orders of this Court dated August 28 and 29, 1991 extended the time for filing petitions for a writ of certiorari until and including October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the law as it stood when this case was decided by the court of appeals, a state-chartered bank could, if permitted by state law, engage in the business of underwriting and selling insurance.[1] This was true whether or not the state bank was owned by a bank holding company. In *Independent Insurance Agents of America, Inc. v. Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 44 (1990) ("*Merchants*"), the court of appeals had held that Section 4 of the Bank Holding Company Act ("BHCA"), 12 U.S.C. 1843, which bars bank holding companies and their nonbank subsidiaries from engaging in most insurance activities, does not apply to a state bank even if it is owned by a holding company. The Board of Governors of the Federal Reserve System ("Board") had urged that result. In the present case, the court of appeals ruled that Section 4 is also inapplicable if the state bank conducts its insurance business

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[1] On November 27, 1991, Congress approved the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, H.R. Conf. Rep. No. 407, 102d Cong., 1st Sess. 1-167, *reprinted in* 137 Cong. Rec. H11,761-11,805 (daily ed. Nov. 26, 1991) ("CDIR Act"). The CDIR Act is now awaiting the President's signature. Section 303 of the CDIR Act would add a new Section 24 to the Federal Deposit Insurance Act, which would prohibit insured state banks and their subsidiaries from engaging in the insurance underwriting business (except to the limited extent national banks may engage in that business). H.R. Rep. 102-407 at 121-23; 137 Cong. Rec. H11,793. There is a grandfather provision for institutions "lawfully providing insurance as principal" on November 21, 1991. *Id.* As we explain below at page 17, the new legislation makes it clearer than it previously was that this case is of no general importance.

through a subsidiary of the bank, rather than in the bank itself. The petition masks the obvious logic of this result by ignoring the Nation's statutory pattern of bank regulation. The Board has not sought certiorari.

1. *Regulation of Banks.* Under our dual banking system, a bank may be chartered either by the federal government or by a state. National banks are chartered and regulated under the National Bank Act by the Comptroller of the Currency ("OCC"). 12 U.S.C. 21 *et seq.* State-chartered banks are chartered and regulated by their states. All state-chartered banks owned by bank holding companies must become "insured banks," 12 U.S.C. 1842(e), and are therefore subject to regulation as well by the Federal Deposit Insurance Corporation ("FDIC"), 12 U.S.C. 1811 *et seq.*

A state bank's chartering authority and the FDIC's statute and regulations define the bank's powers.[2] State chartering authorities, as well as the federal bank regulators, generally permit banks to organize their business so that separately incorporated subsidiaries conduct some of the activities that the bank is authorized to engage in. These "operating subsidiaries" of a bank are treated as part of the bank for regulatory purposes and are subject to the regulatory restrictions applicable to the bank.[3] Indeed, the Board's regulations pertaining to the BHCA include an "operating subsidiary rule," which states that the establishment of a subsidiary by a holding company bank to engage in activities in which the bank may engage is *not* subject to BHCA restrictions that apply to the holding company.[4]

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[2] State-chartered banks that choose to join the Federal Reserve System ("state member banks") are subject to regulation by the Board under the Federal Reserve Act, 12 U.S.C. 221 *et seq.* The Board's authority over state member banks is not involved in this case.

[3] *See* 12 C.F.R. 5.34 (OCC regulation); 12 C.F.R. 250.141 (Board ruling).

[4] 12 C.F.R. 225.22(d)(2)(ii). The operating subsidiary rule provides, in pertinent part, that a state-chartered bank "may, insofar

2. *Insurance Activities of Banks.* Many states permit state-chartered banks to engage in various aspects of the insurance business. Seventeen states, including California and Indiana, permit their commercial banks to engage in insurance brokerage. Conference of State Bank Supervisors, *State of the State Banking System* 10 (1989). Four of these states (including Delaware) empower their commercial banks to underwrite insurance. *Id.* In addition, New York, Connecticut, and Massachusetts authorize FDIC-insured savings banks to underwrite and sell life insurance and annuities through separate insurance departments. N.Y. Banking Law art. VI-A §§ 261, 263, 264; Conn. Gen. Stat. § 36-142; Mass. Gen. L. Ch. 178 §§ 2, 6, 8.

As noted above, late in November Congress adopted new federal provisions, administered by the FDIC under the the Federal Deposit Insurance Act, which specifically deal with state banks' insurance activities. The CDIR Act, which is awaiting the President's signature, would largely prohibit insurance underwriting by insured state banks and their subsidiaries (without regard to whether the state bank is owned by a holding company). The CDIR Act would not affect the authority of state banks or their subsidiaries to engage in insurance brokerage.

3. *Board Authority To Regulate Bank Holding Companies But Not Banks.* Bank holding companies are regulated by the Board under the Bank Holding Company Act of 1956, codified as amended at 12 U.S.C. 1841 *et seq.* Section 3 of the BHCA, 12 U.S.C. 1842, requires a bank holding company to obtain Board approval before acquiring any bank and imposes geographic and other

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as Federal law is concerned and without the Board's prior approval . . . [a]cquire or retain all . . . of the securities of a company that engages solely in activities in which the parent bank may engage, at locations at which the bank may engage in the activity, and subject to the same limitations as if the bank were engaging in the activity directly."

limits on such acquisitions. Section 4, 12 U.S.C. 1843, places substantive restrictions on the "nonbanking" activities of a bank holding company and its nonbank subsidiaries. The BHCA does not, however, give the Board any authority to regulate *banks*.

In *Merchants*, the Second Circuit agreed with the Board that the restrictions in Section 4 of the BHCA do *not* apply to a bank owned by a bank holding company, and accordingly that such a *bank* may engage in insurance activities authorized by its chartering authority, even though its parent *bank holding company* is generally barred by Section 4 from engaging in the insurance business. 890 F.2d at 1277, 1285. The insurance industry trade associations that are petitioners in this case opposed the Board in *Merchants*. They sought a ruling that Section 4 of the BHCA prohibits banks owned by holding companies from engaging in the insurance business. Their petition for a writ of certiorari in *Merchants* was opposed by the Solicitor General on behalf of the Board.

The Solicitor General argued that the Board's interpretation was reasonable and that the "practical significance" of the *Merchants* decision was limited. He noted that the ability of banks to sell insurance, even if they are subsidiaries of bank holding companies and even though bank holding companies may not engage in such activities themselves, "has been an accepted part of the regulatory framework since the passage of the Act." He added that the FDIC has "ample means to assure that federally insured banks do not engage in nonbanking activities that pose undue risks to the federal insurance fund."[5] The Court denied the petition for certiorari. 111 S. Ct. 44 (1990).

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[5] Brief for the Federal Respondent in Opposition at 13-15, *Independent Insurance Agents of America, Inc. v. Board of Governors*, No. 89-1620 ("Merchants Opp.").

4. *Delaware Law Authorizing Insurance Activities.* In May 1990, Delaware amended its Banking Code to permit those Delaware banks not already authorized to do so to "[a]ct as an insurer and transact the business of insurance" (other than title insurance).[6] 5 Del. Code Ann. 761(a)(14). Under Delaware law, the bank may conduct its insurance business within an internal division or department of the bank, or through a subsidiary. Whichever structure is chosen, Delaware law requires the bank to insulate the assets and liabilities of its insurance activities from its other banking activites. *Id.* at § 767; *see also* Pet. App. 7a-8a.

Citibank Delaware is a Delaware state bank owned by respondent Citicorp, a bank holding company. As an insured bank that is not a member of the Federal Reserve System, Citibank Delaware is also subject to regulation by the FDIC but is not subject to regulation by the Board. Citibank Delaware is engaged in a wide variety of banking activities, principally cash management services, leasing and lending. In 1990, Citibank Delaware acquired Family Guardian Life Insurance Company ("Family Guardian") as an operating subsidiary of the bank in accordance with Delaware law. With the approval of the Delaware Bank and Insurance Commissioners, and after prior notice to the FDIC, Family Guardian began in June 1990 to conduct insurance activities as authorized by Delaware law for Delaware banks. *See* Pet. App. 8a-9a.

5. *Proceedings Below.* Petitioners asked the Board to order Citicorp to cause Family Guardian to stop engaging in the insurance business, and the Board granted that relief on September 5, 1990. The Board first found that its "operating subsidiary rule"—which states that a holding company bank may conduct through

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[6] Delaware banks that had been chartered before 1933 by individual legislative charters generally had been granted insurance powers and could already engage in the insurance business.

a subsidiary any business it may conduct itself—was inapplicable; this finding was based on the Board's view that a Delaware bank may not engage "directly" in the insurance business because the Delaware banking law requires insulation between a bank's insurance activities and its other authorized activities. Pet. App. 26a. The Board then held that Section 4 of the BHCA applied to Family Guardian, even though it does not apply to Citibank Delaware. *Id.* at 28a.

Citicorp sought review of the Board's order in the United States Court of Appeals for the Second Circuit. The insurance industry trade associations intervened on behalf of the Board, and the State of Delaware and others intervened in support of Citicorp.

The court of appeals unanimously vacated the Board's order on the ground that the Board had no statutory authority over Family Guardian.[7] The Second Circuit began by noting that, as *Merchants* held, "[t]he Board is without authority [under the BHCA] to limit the activities of a bank subsidiary of a bank holding company." Pet. App. 14a-15a. After further reviewing the structure and language of the statute, the court rejected as untenable the Board's "generation-skipping" approach, Pet. App. 16a, under which the Board claimed that it could regulate the activities of a bank subsidiary's own operating subsidiary even though it conceded that it could not regulate the activities of the bank itself. The court concluded that it was not obliged to defer to an interpretation that would create a fundamental inconsistency in the statute. The BHCA, it said,

[7] The court of appeals assumed "for purposes of this appeal" that the Board's interpretation of its operating subsidiary rule was correct. Pet. App. 13a. The applicability of the operating subsidiary rule would remain to be resolved on remand if this Court were to reverse the court of appeals' determination on the statutory question presented.

> "must be interpreted as a whole and must retain some internal coherence. The Board ruled [in *Merchants*] that whether bank subsidiaries may engage in nonbanking activities is a matter for the chartering authorities of those banks, and not for the Board. Once that decision was made, we cannot agree that the Act can sensibly be construed to permit the Board to displace bank-chartering authorities in determining what activities are permitted for the subsidiaries of bank subsidiaries."

Pet. App. 20a-21a. Only the insurance industry trade association intervenors have sought certiorari.

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or another court of appeals. The Board, although it took a contrary position in the court of appeals, has not sought review in this Court. This case does not present any legal question of general importance and the decision below is of no substantial practical significance. Review by this Court is not warranted.

I. THE DECISION BELOW WAS CORRECT

In *Merchants*, the Board contended, and the court of appeals agreed, that the BHCA does not limit the activities of banks that are subsidiaries of bank holding companies and, in particular, does not bar them from engaging in the insurance business. In the present case, the Board argued below that the BHCA nevertheless does bar subsidiary banks from engaging in the same business *through subsidiaries*. The Board did not explain why it would make any sense for the BHCA to reach operating subsidiaries of banks even though it does not reach banks themselves. The court of appeals, recognizing that it must accord "deference to the view of the agency directly responsible for administering the Act," Pet. App. 20a, concluded that the Board's position was not merely

"a tolerable inconsistency" but "an entirely untenable construction" of the BHCA. *Id.* at 19a. Given the principle established in *Merchants*, the court said, the BHCA cannot "sensibly be construed to permit the Board to displace bank-chartering authorities in determining what activities are permitted for the subsidiaries of bank subsidiaries." *Id.* at 21a. That decision was correct.

A. The Purpose, Structure and Text of the BHCA

The BHCA, enacted in 1956, was designed to fill a gap in the bank regulatory structure. Before 1956, although banks and their subsidiaries were regulated, companies that owned banks were not. As a result, the geographical and activity limitations applicable to the bank itself could be avoided by having a holding company establish or acquire nonbanking subsidiaries (sister corporations to the bank) outside the control of the bank regulators. The BHCA filled this gap by giving the Board regulatory authority over holding companies and their subsidiaries that were not subject to regulation by bank regulators.[8] But the BHCA did not give the Board jurisdiction to regulate *banks*. Banks' activities, including the activities of their subsidiaries, were and are extensively regulated by the FDIC and state authorities (in the case of federally insured state banks that are not members of the Federal Reserve System) and the Comptroller of the Currency (in the case of national banks). The Board has repeatedly emphasized this point.[9]

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[8] *See, e.g.*, S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955); H.R. Rep. No. 609, 84th Cong., 1st Sess. 16 (1955); H.R. Rep. No. 387, 91st Cong., 1st Sess. 15 (1969).

[9] In *Cameron Financial Corp. v. Board of Governors*, 497 F.2d 841, 845 (4th Cir. 1974), for example, the Board successfully argued "that since Congress recognized that banking subsidiaries were already regulated by agencies other than the Federal Reserve . . . Congress intended to grant to the Federal Reserve Board authority to regulate only the previously unregulated nonbanking subsidiaries" of bank holding companies.

In the present case, the Second Circuit started with the conclusion successfully urged on that court by the Board in *Merchants*: "[W]e take the Act as if it said in terms, 'The Board is without authority to limit the activities of a bank subsidiary of a bank holding company.'" Pet. App. 14a-15a. The court then concluded that, in light of the fact that Congress withheld from the Board any BHCA jurisdiction over a holding company's banks, the Board's claim that it could "nonetheless regulate the activities of a bank subsidiary's subsidiary," *id.*, made no sense because the Act "must be interpreted as a whole and must retain some internal coherence." Pet. App. 19a-20a. Since it is clear that bank regulatory authorities under the banking laws, not the Board under the BHCA, determine whether a bank may engage in the insurance business, the BHCA cannot "sensibly be construed," the court of appeals said (Pet. App. 21a), to permit the Board to displace those authorities when it comes to determining whether the bank may do so through its own subsidiary.

The court of appeals was plainly right that the Board's "generation-skipping approach" to the BHCA, Pet. App. 16a, makes no sense. It would create two classes of state-chartered banks—those not owned by bank holding companies who could utilize the authority in state law to set up subsidiaries, and those owned by bank holding companies who could not do so. *Id.* at 15a. And because the "generation-skipping approach" would in any event leave the bank "free to sell insurance, subject to state, not Board regulation," as long as it did so itself rather than through a subsidiary, *id.*, it would not even accomplish the goals that petitioners claim underlie the BHCA.

In a parallel context—defining the Board's authority to order divestitures—Congress explicitly placed operating subsidiaries of banks beyond the Board's reach. Section 5(e)(1) of the BHCA, 12 U.S.C. 1844(e)(1), gives the Board power to order a bank holding company to

terminate "ownership or control of any of its nonbank subsidiaries" if the subsidiary threatens the safety and soundness of a bank owned by the holding company, but the statute expressly denies the Board power to order termination of the ownership or control of "a nonbank subsidiary of a bank." Thus, while Congress authorized the Board to order a bank holding company to dispose of one of its nonbank subsidiaries if it poses a threat to a bank subsidiary, Congress explicitly left the matter of ownership or control of a *bank's own subsidiaries* (even though they would also be second-generation subsidiaries of the holding company) to the bank regulatory authorities, rather than the Board.

The Board's operating subsidiary rule, adopted more than 20 years ago, confirms the point. Under that rule, an operating subsidiary of a holding company bank may conduct any business the bank itself may conduct, without regard to the procedural or substantive requirements of Section 4 of the BHCA. *See* p. 3 n. 4 *supra*. In other words, that rule interprets Section 4 of the BHCA as not applying to operating subsidiaries of holding company banks, a result directly opposite to that sought by petitioners here.[10] Thus the Board's own regulation—on the basis of which thousands of operating subsidiaries of holding company banks have been established without Board approval—shows that petitioners' arguments are wrong.

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[10] The operating subsidiary rule is plainly an interpretive rule, not a blanket exemption granted in the Board's discretion. By its terms, the rule states what "Federal law" permits; and the Board does not have the statutory authority to grant blanket exemptions from Section 4. *Independent Bankers Association v. Board of Governors*, 516 F.2d 1206, 1215-16 (D.C. Cir. 1975); P. Heller, Federal Bank Holding Company Law, § 5.01, at 5-4 to 5-5 (1991). The Board solicited public comment in 1988 on a proposal to withdraw the operating subsidiary rule, 53 Fed. Reg. 48,915 (1988), but the rule has never been withdrawn and remains in effect, *see* 56 Fed. Reg. 54,347-48 (1991).

B. The Terms of Sections 4(a)(1) and 2(g)(1)

Section 4(a)(1) of the BHCA prohibits a bank holding company from acquiring "direct or indirect ownership or control of any voting shares of any company which is not a bank." 12 U.S.C. 1843(a)(1). Petitioners argue in this case that a bank holding company "literally" has "indirect ownership" of a subsidiary of a state bank owned by the holding company. Pet. 11.

But the Court has repeatedly said that when interpreting a statute both courts and agencies "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[11] Particularly in the construction of a term like "indirect," whose meaning is necessarily defined by its context, it was proper for the court of appeals to decline to "make a fortress out of the dictionary"[12] and instead construe Section 4(a)(1) in a way that made sense in the context of the statutory structure.

Under the BHCA, which authorizes the Board to regulate bank holding companies but does not authorize it to regulate banks, it is clear, as the Second Circuit held, that the purpose of the prohibition of both direct and "indirect" ownership was to bar a holding company from making prohibited acquisitions either itself or through "some shell corporation, voting trust, or other nonbanking entity" (Pet. App. 16a). There is no basis for petitioners' contention that the word "indirectly" causes the BHCA to "skip a generation," reaching around or through entities (banks) to which Section 4 of the Act does not apply, to reach a bank's own operating subsidiaries. On the contrary, applying the same or very similar statutory

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[11] *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (citations omitted). *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

[12] *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

language, the Board has repeatedly stated that a bank's operating subsidiary is intended by the statute to be treated as part of the bank itself for regulatory purposes.[13]

Petitioners assert (Pet. 11) that the court of appeals "forthrightly conceded" that a literal reading would bring respondent's ownership of Family Guardian within Section 4, but petitioners have wrenched the Second Circuit's words out of context. The court was not referring to Section 4(a)(1) at all, as petitioners imply, but to Section 2(g)(1).[14] That definitional provision of the BHCA was, as the court of appeals said, Pet. App. 17a, added in 1966 for a technical reason that is irrelevant to this case: to clarify, at the Board's request, that the BHCA applies when a *holding company's* nonbank subsidiaries control, but do not wholly own, another company. The Board said that the original statutory treatment of that particular situation required legislative clarification; but it said nothing about operating subsidiaries of banks.[15] The Board itself successfully argued to the Second Circuit in

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[13] *E.g.*, 12 C.F.R. 250.141 (Board regulation stating that prohibition against state member bank acquiring "any shares of stock of any corporation" does not apply to shares of an operating subsidiary because an operating subsidiary is in effect a separately incorporated department of the bank itself); 12 C.F.R. 250.240 (operating subsidiary "is in effect part of . . . the parent bank" for purposes of affiliate transactions rules).

[14] Section 2(g)(1) provides that "shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company." 12 U.S.C. 1841(g)(1).

[15] *See* Pet. App. 16a-17a; *Report Under Bank Holding Company Act*, 44 Fed. Res. Bull. 776, 782 (1958); *Amend the Bank Holding Company Act of 1956: Hearings on S. 2353, S. 2418, and H.R. 7371 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 341-42 (1966) ("Technical questions have arisen" about how to deal with a situation in which the bank holding company "owns less than 50% of the voting shares of" a company that owns another company).

Merchants that "Congress no more intended to extend section 4 to bank activities in 1966 [when it added Section 2(g)(1)] than it did in 1956."[16]

C. *Chevron*

Petitioners' contention (Pet. 13-15) that the court of appeals misapplied the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), misses the mark altogether. A court's duty under *Chevron* is to determine "whether the agency's answer [to a statutory question] is based on a *permissible* construction of the statute." *Id.* at 843 (emphasis added). A court must defer to "a *reasonable* interpretation made by the administrator of an agency" (*id.* at 844; emphasis added). Here, the court of appeals fully acknowledged its obligation to defer to the reasonable views of the Board. The court said, "We are still obliged to begin our task by according deference to the view of the agency directly responsible for administering the Act." Pet. App. 20a. The court framed the issue in precisely the terms dictated by *Chevron*: "Now we face the issue whether the Fed's view concerning BHCA coverage of the subsidiary's subsidiary is only a tolerable inconsistency [with the view urged by the Board itself in *Merchants*] or an entirely untenable construction, and we conclude it is the latter."

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[16] Brief for Respondent at 38, *IIAA v. Board of Governors*, No. 89-4030. Indeed, as the court of appeals noted, Pet. App. 17a-18a, the same statute that added Section 2(g)(1) to the BHCA also provided, in another section, that any "subsidiary of [a bank holding] company" was to be treated as an "affiliate" for purposes of certain limitations on transactions between a bank and its "affiliates." Act of July 1, 1966, Pub. L. No. 89-485, § 12(a), 80 Stat. 236, 241 (1966). The Board later determined, in its interpretive regulations, that the transaction restrictions applicable to a "subsidiary of a [bank holding] company" did *not* apply to an operating subsidiary of a holding company bank, because the operating subsidiary "is in effect part of . . . the parent bank." 12 C.F.R. 250.240. Congress thereafter codified the Board's interpretation, *see* 12 U.S.C. 371c(b)(2)(A).

Pet. App. 19a. *Chevron* does not demand deference to a construction that is "entirely untenable." [17]

II. THIS CASE DOES NOT INVOLVE ANY CIRCUIT CONFLICT OR PRESENT ANY LEGAL QUESTION OF GENERAL IMPORTANCE, NOR IS THE DECISION OF ANY SUBSTANTIAL PRACTICAL SIGNIFICANCE

The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. In opposing the writ in *Merchants* on behalf of the Board, the Solicitor General noted "the absence of any conflict in the lower courts over the question presented" (Merchants Opp. at 15). The same is true with respect to the present case, a descendant of *Merchants*, and the writ is even more clearly unwarranted here.

This case has no doctrinal importance beyond the point immediately at issue: the Board's assertion of regulatory authority over a bank's subsidiary despite its lack of authority over the bank itself. The court of appeals' decision, and the arguments made to that court by both sides, were concerned entirely with finding a logical thread through the labyrinthine provisions of the BHCA to the circumstances of this case. No one has suggested that the decision could have any bearing on the interpretation of any other statute, or indeed on the interpretation of the BHCA outside this context.

As they did in *Merchants*, petitioners have vastly exaggerated the practical impact of the decision below (Pet. 7). In *Merchants*, which involved the broader question whether the Board under the BHCA could regulate insurance activities of banks themselves, the Solicitor General, speaking for the Board, urged this Court to dis-

[17] *E.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990); *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1988).

count similarly extravagant claims by these same petitioners:

> "[P]etitioners . . . overstate the practical significance of the court of appeals' decision. The decision means only that banks owned by bank holding companies may continue to provide services authorized by the chartering authority—an activity [insurance] that many banks have engaged in since long before the enactment of the Bank Holding Company Act."

Merchants Opp. at 14 (footnote omitted).

The question presented in the present case is obviously of even less importance than the question presented in *Merchants*. Since it is clear under *Merchants* that, insofar as the BHCA is concerned, a bank may engage in insurance activities even if it is a subsidiary of a bank holding company, there is no longer any question whether holding company banks may engage in the insurance business. Thus petitioners' assertion that under the decision below "[a]ny bank holding company can avoid the limitations of the [BHCA] simply by using a state-chartered subsidiary bank as the means to buy an insurance company," Pet. 7, just misstates the issue, for under *Merchants* there is *no* "limitation in the BHCA" on the authority of a state bank to engage in the insurance business. The remaining question—whether under the BHCA the business may be conducted through separately incorporated subsidiaries of the bank rather than in the bank itself—is a small one, and the Second Circuit's decision is in accord with settled banking industry practice.

For the same reason, the long recital (Pet. 7-11) of imagined disastrous consequences of mixing banking and insurance is quite beside the point: banks today engage safely in the insurance business and have done so for a long time; and even if petitioners were to prevail here, banks (including banks owned by holding companies) would not be prohibited from doing so by the BHCA. Petitioners ask that the BHCA be read to impose a sense-

less and artificial constraint on the organization of insurance activities by banks—a constraint that is opposed by "those [the OCC and FDIC] with significant national responsibilities for maintaining a sound banking system." Pet. App. 20a.

The CDIR Act, now awaiting the President's signature, would prohibit all state banks (regardless of whether a bank is owned by a holding company) and their subsidiaries from underwriting insurance (except for the types of insurance that national banks may underwrite). Congress passed this provision in response to the Delaware law described above. *E.g.*, 137 Cong. Rec. S 18625 (daily ed. Nov. 27, 1991) (statement of Sen. Roth). There is a grandfather provision, applicable according to press reports to just two or three institutions (one of which is Citibank Delaware). *See* American Banker, Dec. 2, 1991, at 14. The new legislation reflects Congress' decisions about the extent to which federal laws should limit the insurance activities of state banks. In effect, it confirms the existing jurisdiction of the various *bank* regulators, as interpreted by the Second Circuit in *Merchants* and this case; the CDIR Act would impose federal limits on insurance underwriting activities of state banks by amending the FDIA, not the BHCA. Moreover, the new legislation further limits the practical effect of the decision below. Thus, the CDIR Act makes it even clearer than it previously was that this case does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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